KEMAYAN ENGINEERING (SEA) PTE LTD

v.

SUNYAP DEVELOPMENT SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
AZHAR MA'AH J
[ORIGINATING SUMMONS NO: K24-13-2000]
10 MAY 2001

CONTRACT: *Sale and purchase of property - Strata title yet to be issued - Requirement of sale and purchase that purchaser obtain consent from developer and pay administrative fee in the event of resale - Whether requirement amounted to unconscionable conduct on part of developer - Whether purchaser bound by requirement as it entered into said purchase on own free will - Whether delay by developer in obtaining strata title released purchaser from complying with requirement*

LAND LAW: *Housing developers - Sale and purchase of property - Strata title yet to be issued - Requirement of sale and purchase that purchaser obtain consent from developer and pay administrative fee in the event of resale - Whether requirement amounted to unconscionable conduct on part of developer - Whether purchaser bound by requirement as it entered into said purchase on own free will - Whether delay by developer in obtaining strata title released purchaser from complying with requirement*

The plaintiff entered into two separate sale and purchase agreements ('S & P') for the purchase of two units of shop lots ('the properties') from the defendant. The strata titles to the properties had yet to be issued and cl. 6(9) of the S & P stated that the plaintiff should not sell the properties without the consent of the developer and if such a consent was so given, the plaintiff would be required to pay the defendant an administrative fee equivalent to 1% of the purchase price or RM10,000, whichever was the greater. As the plaintiff now wanted to sell the properties, the plaintiff applied to the court for a declaration *inter alia* that the imposition of such payment was harsh, unfair, oppressive and unconscionable and therefore not binding on the plaintiff.

Held:

[1] The type of premises purchased can be taken as an indicator as to the stature and standing of the purchaser. That will in turn assist the court in determining whether one party in the transaction has been at a serious disadvantage to the other whether through poverty,

ignorance, lack of advice or otherwise. A purchaser of commercial premises may be presumed to have a good and sound financial standing and thus bargaining power so as to negotiate and bargain with the developer of the properties and secure the best possible terms in the transaction. Further, by the reason of his sound financial standing he is presumed to have the ability to seek the necessary advice. (p 28 c-f)

[1a] The plaintiff being a company was not the kind of purchaser that the defendant could grossly take advantage of. The plaintiff had the ability to seek the necessary advice from a solicitor and make its choice whether or not to proceed with the purchase of the properties after finding the terms of the S & P unfavourable. Further, the plaintiff had executed the S & P on its own free will. It was also presumed that the plaintiff entered into the S & P in full awareness of the terms and conditions therein. In the circumstances, it could not be said that cl. 6(9) had been procured by the defendant in a morally reprehensible manner. (p 29 a-c)

[2] The defendant did not depose in its affidavits what steps had been taken to procure the strata titles. The plaintiff had been holding the properties in question for more than ten years and the S & P did not set out any time frame for the strata titles to be issued or obtained by the defendant. In the absence of any explanation from the defendant for the long delay in obtaining the strata titles, the defendant was guilty of indolence in performing its side of the obligation with respect to the non-issue of the strata titles. In the circumstances, it would not be just for the court to allow the defendant to collect the administrative charges for an indefinite long period. The whole idea of cl. 6(9) was to discourage short term speculation by certain purchasers. (pp 29 e & 30 a)

[3] The plaintiff should not be penalised for wanting to transfer the properties. Had it not been for the defendant's own indolence, the plaintiff would have been able to transfer the properties without having to pay the RM10,000. The plaintiff was only required to pay the defendant the actual costs and expenses that were incidental to the transfer and endorsement of the deed of assignment. (p 30 b)

[Order accordingly.]

Case(s) referred to:

Alec Lobb Ltd v. Total Oil [1983] 1 WLR 87 ***(refd)***

Fong Whye Koon v. Chan Ah Thong [1996] 2 SLR 706 ***(refd)***

Lim Seang Mee v. Keepahead Holdings Sdn Bhd [1992] 3 CLJ 1445; [1992] 2 CLJ (Rep) 776 ***(refd)***

Multiservice Bookbinding Ltd & Ors v. Marden [1978] 2 All ER ***(refd)***

The Commercial Bank of Australia v. Amadio & Anor [1983] 53 (High Court of Australia 358) ***(refd)***

For the plaintiff - Victor Chong Thein Loi; M/s Poh & Victor Chong
For the defendant - Phyllis Lok; M/s Cheu Adnan & Razi

Reported by Usha Thiagarajah

JUDGMENT

Azhar Ma'ah J:

In this case, the plaintiff entered into two separate sale and purchase agreements, both dated 27 June 90 for purchase of two units of shoplots ie, Units No. B 51 and B 52 respectively at Second Floor, Centre Point, Kota Kinabalu from the defendants. All terms and conditions in the said agreements are similar and identical.

As separate strata titles to the premises in the shopping complex have yet to be issued the defendant as developer of the project has deemed it necessary to attach a condition in the agreements whereby the purchaser shall not dispose of the premises without the prior consent of the developer. Further upon consent being given for the said disposal the purchasers are required to pay to the developer an administrative charge of a sum equal to one per centum of the purchase price or RM10,000 whichever is the greater together with other costs and expenses. This requirement is reflected in cl. 6(9) of the agreement which provides:

> Until issue of a subsidiary title to the premises and a transfer thereof to the Purchaser, the Purchaser shall not under any guise or pretext whatsoever sell, transfer, assign or nominate or attempt to sell, transfer, assign or nominate all or any of the right, duties or obligations under this Agreement and/or dispose of the premises or any part thereof or any interest therein without the prior written consent of the Developer. If such consent shall have been obtained the Purchaser shall pay to the Developer an administrative charge of a sum equal to one per centum (1%) of the purchase price or Malaysia Ringgit Ten Thousand (RM10,000.00.) whichever is the greater and the Purchaser shall in addition pay for all other costs and expenses of such transfer or assignment including the Developer's solicitors charges. All such transfer or assignment must be prepared by the Developer's nominated solicitors that is to say Messrs Lee Koh & Company, Advocates and Solicitors of Sabah.

About nine years later, the plaintiff wanting to dispose of the properties in question on 20 July 1999 entered into a sale and purchase agreement with one Monex Sendirian Berhad for the sale of the same. Subsequently the plaintiff's solicitors wrote to the defendant forwarding (i) the relevant deed of assignment between the parties for the defendant's consent and acknowledgement and (ii) the relevant memorandum of transfers in respect of the said premises between Monex Sendirian Berhad and the defendant for execution by the defendant in escrow. The defendant responded by requiring the plaintiff to submit payments as stipulated in the aforementioned cl. 6(9) of the agreement before the plaintiff's request could be met. The plaintiff, not willing to make the payments in question in particular the administrator charges of RM10,000, filed this originating summons seeking the court's declaration *inter alia* that the imposition of such payment together with other charges including the defendant's solicitor's charges are harsh, unfair, oppressive and unconscionable and therefore not binding on the plaintiff.

To drive home their points and arguments solicitors for the plaintiff drew this court's attention most importantly to the principle of the doctrine of unconscionability or unconscionable bargain that is depicted and illustrated in the decision of the courts both at home and abroad.

Heading the authorities referred and highlighted in counsel's submission is the English Court's decision in *Multiservice Bookbinding Ltd and Others v. Marden* [1978] 2 All ER. This case involved a loan transaction agreement where one of the complaints was that the principal and interest to be repaid under a clause of the agreement for exceeding in value nominal amount of sum cent.

The issue that arose was whether such clause was unfair and unconscionable and therefore unenforceable. It was decided that the court would hold that a bargain was unfair and unconscionable only where it was shown that one of the parties to it had imposed objectionable terms in a morally reprehensible manner. As the plaintiffs in that case had entered into the bargain with their eyes open, with the benefit of independent advice and without any compelling necessity to accept the 36,000 pounds on the terms offered the court held that there was nothing unfair, oppressive or morally reprehensible in the terms of the mortgage. The ratio in this judgement had also been applied in another English case *Alec Lobb Ltd. v. Total Oil* [1983] 1 WLR 87.

The court in that case had also stated that "the court is concerned, not with the reality of the weaker party's consent, but with the conduct of the stronger; for the word "unconscionable", seems to relate to the terms of the bargain and to the behaviour of the stronger party."

Adding local flavour to his submission counsel for the plaintiff further referred the court to the case of *Lim Seang Mee v. Keepahead Holdings Sdn Bhd* [1992] 3 CLJ 1445; [1992] 2 CLJ (Rep) 776. Mohd Dzaiddin J (as he then was) in that case held that the defendants as developer in exercising its discretion to consent to an assignment of right of the purchaser to a third party and its undertaking to execute a valid memorandum of transfer in favour of the third party upon the issue of the strata title was entitled to payment of administrative fee, but in a fair and reasonable amount. In this case the fair and reasonable amount was held to be $500 as opposed to $2000 demanded by the defendants. This decision was subsequently affirmed by the Supreme Court.

The other ground relied upon by the plaintiff is lack of consideration. It is submitted that as cl. 6(9) of the agreement provided that the plaintiff shall also pay all other costs and expenses of such transfer or assignment and developers solicitors charges too, the payment of administrators charges of RM10,000 is totally devoid of consideration. Against this proposition counsel referred the courts to an Australian case of *The Commercial Bank of Australia v. Amadio And Another* [1983] 53 High Court of Australia 358, and a Singapore case of *Fong Whye Koon v. Chan Ah Thong* [1996] 2 SLR 706. In these cases, the courts had held that lack or conspicuous inadequacy of consideration was a ground for equity courts to intervene or set aside a contract.

Further the plaintiff also urged the court to take into consideration, two other factors. Firstly, the plaintiff had duly settled the full purchase price of the shop lots and therefore should be entitled to deal with the properties as he thinks fit. Secondly, the plaintiff would have been able to dispose of the properties had it not been for the unavailability of strata titles at this point of time. It is further contended that the defendant had failed to depose the steps that have been taken to procure the strata titles.

The main contention of the defendant in opposing the plaintiff's application is that the plaintiff had freely and willingly entered into the sale and purchase agreements in question.

It is submitted that at the time the execution of the contract the plaintiff did not raise any objection as to the requirement in cl. 6(9). It is further submitted that following the principle in *Multiservice Bookbinding* the plaintiff has failed to come out with evidence that the defendant had acted in a "morally reprehensible manner", or show any unconscionable conduct or fraudulent acts on the part of the defendant, or otherwise upon entering the contract with the plaintiff.

To free himself from the contractual obligation under cl. 6(9) of the agreement, the plaintiff must prove firstly, one party has been at a serious disadvantage to the other. Secondly, that serious disadvantage of the one party has been exploited by the other in some morally culpable manner; and thirdly, the resulting transaction has been, not merely harsh or improvident, but overreaching and oppressive. Against the three requirements of proof the defendant argued that the plaintiff being a corporation has the means and ability to properly assess the terms of the sale and purchase agreements before executing the contracts.

It is further submitted for the defendant that the sales and purchase agreements in question are standard formats normally used by other developers. Provision such as cl. 6(9) is not unusual and let alone unconscionable. The administrative charges is comparable to that charged by other developers in respect of commercial properties in Sabah.

It is further submitted by counsel for the defendant that it has been a standard conveyancing practice for any new purchasers of property in the absence of an issue document of title to obtain from the developer all the necessary consent and endorsement subject to payment of "administrative fee" as consideration.

Counsel further distinguished *Lim Seang Mee* from the present case in that in *Lim Seang Mee* there was no contractual provision as to the amount to be payable to the developer as 'administrative fee'.

The figure $2,000 was unilaterally fixed by the developer, whereas in the present case both the purchaser and the developer had mutually agreed RM10,000 to be the 'administrative fee' as evidenced in cl. 6(9). In the circumstances, decision of the court in *Lim Seang Mee* cannot be applied to the present case.

Lastly, the defendant pleaded the doctrine of laches. It is contended that the plaintiff's action has been barred by his laches as it took about ten years for the plaintiff to institute this proceedings.

Findings Of The Court

Clearly, there is no factual dispute in this case. Central to this application is the issue whether or not the requirement that the plaintiff is required to pay RM10,000 as "administrative charges" to the defendant for the defendant's consent and endorsement on the transfer and assignment of the properties respectively as stipulated in cl. 6(9) of the agreement amounts to unconscionable conduct or unconscientious use of power by the defendant so as to render the clause liable to be set aside.

To start with I am quite attracted to the defendant's counsel's little argument that the properties in question are business and commercial lots and not residential premises. This point which is not extensively argued in the counsel's submission is of significance. The type of premises to my mind can be taken as an indication as to the stature and standing of the purchaser. This will in turn assist the court in determining whether one party in the transaction has been at a serious disadvantage to the other whether through poverty or ignorance or lack of advice or otherwise. A purchaser of a low-cost house and that of prestigious commercial premises for example may have different level of advantage or disadvantage as against the developers of their respective properties. A low-cost house purchaser who is in a dire need to have a shelter over his head may not have much say in the transaction. He will be in a position of "take it or leave it". Whereas a purchaser of commercial premises may be presumed to have a good and sound, financial standing and thus better bargaining power so as to be in a position to negotiate and bargain with the developer of the properties and secure the best possible terms in the transaction. Further by reason of his sound financial standing he is presumed to have the ability to seek the necessary advice.

The case of *Multiservice Bookbinding Ltd. and Others v. Marden (supra)* clearly stated that for the court to set aside any terms of a transaction which have been mutually agreed it must be shown that such terms were procured by unfair and unconscionable means which is morally reprehensible so much so it effects the person's conscience.

The learned judge in this case had amply stated a classic example of such unconscionable bargain ie, where advantages has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would accept.

Applying this illustration to our present case I do not think the plaintiff being a company, was the kind of purchaser that the defendant can grossly take advantage of. It can be presumed that the plaintiff had the ability to seek the necessary advice from a solicitor and make its choice whether or not to proceed with the purchase of the properties after finding the terms of the sale and purchase agreement unfavourable.

Further I do not find any compelling factors that compelled the plaintiff into executing the agreement in question. As such I agree with the submission of the defendant's solicitor that the plaintiff had executed the sale and purchase agreements on its own free will. It is also presumed that the plaintiff had entered into the contracts in full awareness of the terms and conditions therein. In the circumstances it cannot be said that the terms of the agreement in particular cl. 6(9) has been procured by the defendant in a morally reprehensible manner.

Be that as it may, in the circumstances of the case there are other factors that have to be taken into consideration before coming to any decision respecting the plaintiff's application. It has been argued for the plaintiff that as the purchase price has been fully settled the plaintiff would have been able to deal with the properties as it thinks fit had it not been for the fact that the defendant had not obtained the strata titles. As pointed out by counsel for the plaintiff the defendant did not in its affidavits depose what steps have been taken to procure the strata titles. The plaintiff has been holding the properties in question for more than ten years, and the sale and purchase agreements do not set out any time frame for the strata titles to be issued or obtained by the defendant.

As pointed out by counsel for the plaintiff there seemed to be no deposition by the defendant enlightening the court as to what steps have been taken by the defendant to procure the strata titles while the plaintiff is restrained from freely dealing with his properties, the agreements do not seem to set out a time frame for the defendant to procure the strata titles. It must be noted that the plaintiff has been holding his properties for more than ten years since the purchase; while the defendant on the other hand has not been able to tell the court what has been done towards the performance of its obligation to secure the strata titles. In the absence of the information to exculpate itself from any blame for the long delay in obtaining the all important strata titles it can be said that the defendant has been guilty of indolence in performing his side of the obligation with regard to the non-issue of the strata titles.

In the circumstances it would not be just for the court to allow the defendant to collect the so-called "administrative charges" for an indefinite long period as in this case as the whole idea of cl. 6(9) I think, is to discourage short term speculation by certain purchasers. In the circumstances of this case the plaintiff should not be penalised for wanting to transfer the properties which he would have been able to do so without having to pay the RM10,000 had it not been for the defendant's own indolence. All that the plaintiff needs to pay to the defendant is the actual costs and expenses that are incidental to the transfer and endorsement of the deed of assignment. Having arrived at this decision, other arguments put to fore by the defendant are of no consequence and therefore irrelevant.

I order accordingly and make no order as to costs.